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No. ICC-02/05-01/20

Date: 14 August 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

Decision on the Defence Request for Interim Release

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart

Counsel for Mr Abd-Al-Rahman
Mr Cyril Laucci

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

JUDGE ROSARIO SALVATORE AITALA, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court,¹ having regard to Articles 58(1) and (4) and 60(2) of the Rome Statute (the ‘Statute’), Rule 118 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulation 51 of the Regulations of the Court (the ‘Regulations’), issues this Decision on the Defence Request for Interim Release.²

I. PROCEDURAL HISTORY

1. On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor’s application under article 58(7) of the Statute³ and decided⁴ to issue a warrant of arrest against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’)⁵ for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas, in Darfur, Sudan, between August 2003 and March 2004.
2. On 16 January 2018, Pre-Trial Chamber II, in its previous composition, granted the Prosecutor’s application to amend the first warrant of arrest pursuant to article 58(6) of the Statute⁶ by issuing a second warrant of arrest against Mr Abd-Al-Rahman⁷ for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas, in Darfur, Sudan, between on or about 5 to 7 March 2004.
3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself and was transferred to the Detention Centre of the Court.

¹ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

² Requête en vertu de l’Article 67-1-f, 25 June 2020, ICC-02/05-01/20-7 (with confidential Annex ICC-02/05-01/20-7-Conf-Anx).

³ Prosecutor’s Application under Article 58 (7), 27 February 2007, ICC-02/05-55-US-Exp (public redacted version notified on the same day, ICC-02/05-56).

⁴ Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr.

⁵ Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

⁶ Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”) by adding new crimes, 3 November 2017, ICC-02/05-01/07-73-Secret-Exp (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

⁷ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Secret-Exp (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

4. On 12 June 2020, the Chamber decided to sever the case against Mr Abd-Al-Rahman from the case of *The Prosecutor v. Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).⁸

5. On 1 July 2020, the Defence submitted a request for the interim release of Mr Abd-Al-Rahman, pursuant to article 60(2) of the Statute (the ‘Interim Release Request’).⁹

6. On 13 July 2020, the Prosecutor submitted a response to the Interim Release Request (the ‘Prosecutor’s Response’ or the ‘Response’).¹⁰

7. On 22 July 2020, following its request and the Chamber’s authorisation,¹¹ the Defence submitted its reply to the Prosecutor’s Response (the ‘Defence Reply’).¹²

II. SUBMISSIONS

The Interim Release Request

8. The Defence requests that Mr Abd-Al-Rahman be granted interim release to the Kingdom of the Netherlands (‘the Netherlands’), and requests that the Single Judge invite the host State to submit observations on the release of Mr Abd-Al-Rahman to its territory. In this regard, the Defence notes that the suspect is currently detained in the Netherlands, and that release to this country would be the only real choice due to the Covid-19 pandemic. The Defence argues that the suspect is willing to comply with any conditions of release that the Single Judge deems appropriate, noting however that the suspect would likely not have the financial means to post bond or security pursuant to regulation 119(1)(g) of the Regulations.

9. In the view of the Defence, even if the suspect would be tempted to abscond – which the Defence denies - he would be unable to do so, as the suspect (i) does not speak Dutch or English; (ii) has no contacts in the Netherlands; (iii) lacks financial

⁸ Decision severing the case against Mr Ali Kushayb, ICC-02/05-01/07-87.

⁹ Requête en vertu de l’Article 60-2, ICC-02/05-01/20-12.

¹⁰ Prosecution’s Response to « Requête en vertu de l’Article 60-2 » (ICC-02/05-01/20-12), ICC-02/05-01/20-95.

¹¹ Requête en vertu de la norme 24-5 du Règlement de la Cour (autorisation de Réplique à ICC-02/05-01/20-95), ICC-02/05-01/20-96 ; Decision on Defence Request for Leave to Reply, ICC-02/05-01/20-99.

¹² Réplique à la «Prosecution’s Response to ‘Requête en vertu de l’Article 60-2’» (ICC-02/05-01/20-95), ICC-02/05-01/20-100.

resources, and (iv) has no identity documents in his possession, as they have been retained by the Court.

10. The Defence argues that since the suspect has voluntarily surrendered to the Court, continued detention is no longer necessary to ensure his appearance. Further, the Defence submits that the only reason a warrant of arrest was issued against the suspect in 2007 was on account of his alleged detention by the Sudanese authorities, which would have prevented him from voluntarily appearing before the Court. However, the Defence submits that the document relied on to support the suspect's alleged detention in Sudan lacks reliability, and that without evidence that he was in fact detained, the grounds of article 58(1)(b)(i) of the Statute were not met.

The Prosecutor's Response

11. The Prosecutor submits that the Interim Release Request should be rejected, as the requirements under article 58(1)(a) and two of the conditions set out under 58(1)(b) continue to be met. In effect, the Prosecutor submits that continued detention is necessary to ensure the suspect's appearance at trial, and that releasing the suspect at this stage could risk endangering the Prosecutor's ongoing investigation and court proceedings.

12. While the Prosecutor does not have direct knowledge of the reason for the suspect's voluntary surrender, the Prosecutor argues that it is 'not unlikely' that he was motivated to surrender in order to 'avoid capture in Sudan and confinement in a prison in Khartoum'. Furthermore, the Prosecutor submits that the additional charges set out in the second warrant of arrest, which the suspect was not aware of prior to his surrender, may 'provide an even greater incentive to abscond'.

13. The Prosecutor further argues that in his capacity as the 'colonel of colonels' for the whole of Wadi, the Salih area in Darfur, the suspect maintained a network of support from powerful individuals throughout his 13 years as a fugitive. In the view of the Prosecutor, there is no reason to believe that this network would no longer be willing to facilitate the suspect's escape from the Court. According to the Prosecutor, the suspect's lack of travel documentation does not pose an impediment to his escape, since the open nature of borders in the Schengen Area of the EU would make it 'exceptionally difficult to restrict the movement of Mr Abd-Al-Rahman once he has been released'.

14. In regard to article 58(1)(b)(ii), the Prosecutor submits that (i) as recently as February 2020, the suspect was reported to have threatened the lives of human rights activists in South Darfur, while accompanied by other armed members of the Central Reserve Police who were allegedly operating under his command; (ii) the suspect's unrestricted access to telephones, the internet, and even bank transfers 'extends the reach of influence that he may exert from afar to indirectly intimidate, coerce and silence witnesses'; (iii) the Prosecutor currently does not have the ability to 'adequately mitigate the risk of harm to its witnesses residing in Sudan to an acceptable level'; and (iv) the suspect's release 'could bring real and substantial harm to witnesses who currently reside in the EU'.

The Defence Reply

15. The Defence argues that, while the Prosecutor alleges that the suspect served as a *de facto* military commander in Darfur until recently, the Prosecutor failed to specify what militia the suspect allegedly belonged to and does not provide any evidence in support of this allegation. In addition, the allegation of recent violence by Mr Abd-Al-Rahman is supported only by an internet article from an organization called 'Darfur Network for Monitoring and Documentation'. Even if this report were to be believed, the Defence submits that it cannot be relied upon since: (i) the document references allegations against 'Ali Kushayb', without establishing a link between 'Ali Kushayb' and the suspect; (ii) the report is, at best, hearsay from an anonymous source, and there is no information regarding how or from what source the organization received this information; and (iii) the members of the organization are not identified on the website, and thus it is unclear whether the report comes from an impartial source.

16. The Defence also submits that the argument that the Prosecutor would not have the means to control or monitor the interaction between the suspect and his 'associates' that may cause irreparable damage to witnesses in Sudan is problematic, as any Prosecution witnesses must reside outside of Sudan, since there is no agreement in place between the Court and Sudanese authorities for investigations to take place within the State. Accordingly, the Prosecutor is unable to argue that the provisional release of Mr Abd-Al-Rahman would impact on the safety of witnesses in Sudan.

17. Regarding the possibility of free movement within the European Union (the 'EU'), the Defence argues that it should not be a barrier to release, and furthermore, the Prosecutor cannot rely on its own breach of secrecy regarding the location of witnesses in the EU, information first revealed in the public Prosecutor's Response, to argue against the release of the suspect.

18. The Defence also submits that, while the Prosecutor indicates that there is a risk that Mr Abd-Al-Rahman may intimidate, corrupt, or otherwise interfere with witnesses, the Prosecutor has not suggested that any such attempts have taken place. Further, if the Prosecutor believes that the suspect has engaged in such activities, these should be the subject of article 70 proceedings.

19. The Defence notes that it has not received disclosure regarding the identities of any witnesses thus far. In any case, the Prosecutor has failed to explain what impact provisional release with conditions would make in terms of the suspect's ability to reveal the identity of witnesses to unidentified associates, if he wished to do so, which the suspect denies.

20. The Defence submits that this case is distinguished from *Ntaganda*, in that in the latter case, the identities of more than 30 witnesses had been disclosed, and several reports were provided that referred to Ntaganda's past violence. In contrast, no witness identities have been revealed to the Defence in the present case, and the Prosecutor has only referred to one internet article alleging violence committed by 'Ali Kushayb'.

21. The Defence submits that the seriousness of the charges against the suspect, in the absence of other criteria, cannot be sufficient to justify the continued detention of the suspect. As the Court was created to try the most serious crimes of international concern, this criterion will be satisfied for all suspects.

22. The Defence submits that, if released, the suspect is willing to comply with the strictest security conditions, including the use of an electronic bracelet, limitation of telephone contacts, an obligation to report regularly to an authority, and the non-return of his passport and other travel documents. These possible conditions for release must be taken into account and, in the view of the Defence, are sufficient to allay any concerns.

III. ANALYSIS

23. At the outset, the Single Judge recalls that, in considering the right to interim release, one must bear in mind the fundamental principle that deprivation of liberty is the exception and not the rule.¹³

24. In reaching a decision under article 60(2) of the Statute, the Chamber must inquire anew into the existence of facts justifying detention. The Pre-Trial Chamber's powers are not determined by previous decisions on the issuance of a warrant of arrest; nevertheless, the Chamber may refer to the decision on the warrant of arrest, without affecting the *ex-novo* character of the Pre-Trial decision.¹⁴

25. In considering the present request pursuant to article 60(2) of the Statute, the Single Judge must therefore determine whether, pursuant to article 58(1)(a) of the Statute, there are reasonable grounds to believe that Mr Abd-Al-Rahman committed a crime within the jurisdiction of the Court and whether, pursuant to Article 58(1)(b) of the Statute, the continued detention of the suspect appears necessary to: (i) ensure his appearance at trial; (ii) ensure the investigation or court proceedings are not obstructed or endangered; or (iii) prevent him from continuing to commit crimes within the Court's jurisdiction. The conditions set out in article 58(1)(b) of the Statute are alternative in nature, thus if one requirement is fulfilled, there is no need to address the remaining requirements.¹⁵

¹³ Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on Application for Interim Release, 16 December 2008, ICC-01/05-01/08-321, para. 31; Pre-Trial Chamber I, *The Prosecutor v. Katanga and Mathieu Ngudjolo Chui*, Decision on the Conditions of the Pre-Trial Detention of Germain Katanga, 21 April 2008, ICC-01/04-01/07-426, page 6; Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-01/07-572 (OA4), para. 10.

¹⁴ Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red, paras 22-28.

¹⁵ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red (OA2), para. 89. See also: Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, para. 139.

Article 58(1)(a) of the Statute

26. Turning to article 58(1)(a) of the Statute, the Single Judge notes at the outset that the Defence has not contested this point. In light of the findings in the two warrants of arrest issued for Mr Abd-Al-Rahman, the Single Judge considers that there are reasonable grounds to believe that the suspect is responsible for war crimes and crimes against humanity allegedly committed in Darfur. Therefore, the requirement of article 58(1)(a) of the Statute continues to be satisfied.

Article 58(1)(b)(ii) of the Statute

27. The assessment under article 58(1)(b)(ii) of the Statute requires the Single Judge to consider whether Mr Abd-Al-Rahman's continued detention appears necessary to ensure the investigation or court proceedings are not obstructed or endangered.

28. The Single Judge considers the Prosecutor's submission that it is not yet in a position to protect witnesses in Darfur, as well as the report of threats allegedly made by the suspect and his supporters to human rights activists in February 2020.¹⁶ Considering that the latter report comes from a news source, the Single Judge notes the finding in the *Gbagbo* case that there is no 'impediment to the use of such material, or any requirement that it be corroborated. Rather, the Single Judge must analyse all the material placed before it, in order to determine what weight must be given to it for the purpose of the determination.¹⁷ Further, and as set out in the *Ntaganda* case, an assessment pursuant to article 60(2) of the Statute 'speaks to a standard of "appearance" that a continued detention is necessary', and 'the evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature and strength as the

¹⁶ Annex 3 to the Prosecution's Response to "Requête en vertu de l'Article 60-2" (ICC-02/05-01/20-12), 13 July 2020, ICC-02/05-01/20-95-Anx3.

¹⁷ Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 13 July 2012, ICC-02/11-01/11-180-Red, para. 54. Note that this decision was upheld on appeal: Appeals Chamber, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red. See also *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147, paras 47-48.

evidence required to establish reasonable grounds to believe that the person has committed one or more crimes referred to in the Prosecutor's application'.¹⁸

29. In light of the alleged high ranking position previously held by the suspect in Darfur,¹⁹ the connections that he held in this role, and the likelihood that he still has supporters who may have access to actual or potential witnesses,²⁰ the Single Judge finds that if interim release were to be granted, it would present an unacceptable risk that the suspect may exert pressure on witnesses, either directly or indirectly through his supporters. Given the interests at stake, namely the integrity of the investigations and of the proceedings and the safety of witnesses, the Single Judge is of the view that at this stage, these risks would not be sufficiently mitigated by imposing conditions upon interim release. On this basis, the Single Judge finds that the requirement of article 58(1)(b)(ii) of the Statute is fulfilled, and that the continued detention of Mr Abd-Al-Rahman is justified at this phase of the proceedings in order to ensure that the suspect does not obstruct or endanger the investigation or the Court's proceedings.

30. As the criteria under article 58(1)(b) of the Statute are alternative in nature, the Single Judge finds that there is no need to address the requirements under article 58(1)(b)(i) or (iii) of the Statute, since the requirement under article 58(1)(b)(ii) of the Statute is fulfilled.

31. The Single Judge stresses that this determination is subject to review in light of further developments, and that the need for continued detention shall be reviewed every 120 days, pursuant to rule 118(2) of the Rules. In the interim, the Prosecutor, in collaboration with the VWU, is expected to take reasonable steps to put in place mechanisms to protect potential witnesses and/or safeguard potential evidence, and to collect more detailed information and evidence about Mr Abd-Al-Rahman's remaining position of influence in the region.

¹⁸ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147, para. 47.

¹⁹ Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr, page 17; Second Warrant of Arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 16 January 2018, ICC-02/05-01/07-74-Secret-Exp, 11 June 2020. ICC-02/05-01/07-74-Red.Second Arrest Warrant, page 3.

²⁰ Annex 3 to the Prosecution's Response to "Requête en vertu de l'Article 60-2" (ICC-02/05-01/20-12), 13 July 2020, ICC-02/05-01/20-95-Anx3.

32. Finally, the Single Judge notes that observations were not sought from the Host State for the purpose of the present decision, as such observations were unnecessary in light of the Single Judge's findings in relation to article 58(1) of the Statute. In the view of the Single Judge, while interim or conditional release cannot be granted unless State observations have first been requested, regulation 51 of the Regulations cannot be understood as requiring that observations must be requested even when the Chamber does not intend to grant interim release.

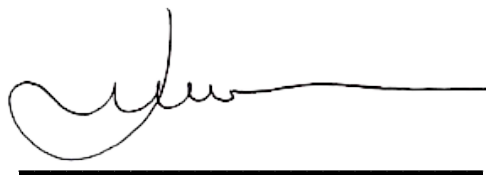
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Interim Release Request for Mr Abd-Al-Rahman;

ORDERS the continued detention of Mr Abd-Al-Rahman; and

DETERMINES that the 120 day period for review set out in rule 118(2) of the Rules shall commence as of the date of notification of the present decision.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line.

Judge Rosario Salvatore Aitala
Single Judge

Dated this Friday, 14 August 2020

At The Hague, The Netherlands